T & L Leasing *and* General Teamsters Local Union 174, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 19–RC–12926

August 15, 1995

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS COHEN, BROWNING, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to a mail ballot election held from November 28 through December 9, 1994, and the Regional Director's report recommending disposition of them. The election was conducted following the parties' execution of, and the Regional Director's approval of, a Stipulated Election Agreement (Agreement or Stipulation). The tally of ballots shows 11 for and 2 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, adopts the Regional Director's findings and recommendations only to the extent consistent with this Decision and Direction,[1] and finds that the election must be set aside and a new election directed.[2]

In its Objections 1 through 8, the Employer alleged that the Regional Director interfered with the election by scheduling and conducting a mail ballot election contrary to the terms of an approved Stipulated Election Agreement. The Regional Director recommended overruling these objections, finding that the mail ballot election was the only reasonable alternative under the circumstances presented. The Employer excepts, arguing that the Regional Director materially breached the terms of the Stipulated Election Agreement. The Employer argues that the Agreement gave the Regional Director the discretion to select a site for a manual election, but the Agreement did not give him discretion to hold a mail ballot election. For the following reasons, we find merit to the Employer's exceptions.

On November 8, 1994, the Regional Director approved a Stipulated Election Agreement negotiated by the parties. The Agreement specified that an election would be held on December 2, 1994, from 8 to 9:30 a.m. and from 7 to 8 p.m., at a ''[p]lace to be determined by the Regional Director.'' The Agreement clearly contemplated that the election would be manually conducted on the agreed-upon date at a site to be determined by the Regional Director.[3]

After approving the Agreement, the Regional Director ordered that the election be conducted in a trailer on the property of Sears, Roebuck & Co., where the Employer's unit employees reported for work. A notice informing employees of this polling place was mailed to the Employer. Subsequently, however, the Employer learned that Sears would not permit the election on its premises. The Employer informed the Region of Sears' refusal, and proposed alternative sites for the manual election. One suggested alternative was a motel conference room within walking distance from the Sears facility.

There is no evidence or claim that the alternative sites proposed by the Employer were inappropriate, or that other suitable sites were unavailable.[4] When the Union objected to an off-site election,[5] the Regional Director however modified the terms of the Stipulation by ordering a mail ballot election. The Regional Director notified the parties of this modification on November 18, 1994, and announced that a mail ballot election would commence on November 28—rather than December 2 as set forth in the Agreement—and would run until December 9, 1994.

The Employer immediately objected to the Regional Director's modification. It argued that the mail ballot election was contrary to the express terms of the Stipulation which specified the agreed-upon unit, date, and time of the election, with only the site to be deter-

[1] Because we find that the election must be set aside based on Employer Objections 1 through 8, it is unnecessary to pass on Objections 9 through 11.

[2] In view of our Direction of a Second Election, we reject as moot the Employer's request that any further investigation of its objections be transferred to another region.

[3] The Regional Director asserts in his Report on Objections that, prior to approval of the Stipulated Election Agreement, the Employer did not inform the Region that it lacked its own premises and that the unit employees reported to the property of Sears, Roebuck & Co. The Employer conversely contends that it informed the Region, prior to approval of the Stipulation, that its facility was located on Sears' property and that Sears' approval would be required to conduct an election there. The Employer further asserts that the fact that the Stipulation gave the Regional Director authority to determine the election site demonstrates the parties' uncertainty as to where the election would be held.

We need not resolve this issue of credibility. As noted, infra, the parties interpreted the Stipulation as permitting an off-site election, i.e., at Sears, and the election would have been held there if Sears had been willing to have the election conducted on its property.

[4] Although procedures specified in the Board's Casehandling Manual, Part II, Representation Proceedings, are not binding procedural rules, Sec. 11032.2 of the Casehandling Manual provides guidance in situations, like here, where the election site is left for Regional Director determination, and on-site balloting is not possible. In these circumstances, Sec. 11032.2 provides that the Regional Director is to determine the polling site after considering the proposals of the party seeking an off-site location for the election, the availability of that location, and whether it is reasonably close to the worksite.

Here, the Regional Director does not find that the sites proposed by the Employer were unreasonable. Rather, the Regional Director, contrary to Sec. 11032.2, rejected consideration of any manual polling place, apparently because the Union opposed off-site balloting.

[5] The reason for the Union's opposition to an off-site election was not specified by either the Regional Director in his report, or by the Union in its brief opposing the Employer's exceptions.

mined by the Regional Director. The Employer also reiterated that it had located a suitable off-site polling place in the Valu-U Inn, located within walking distance from the T & L Leasing Terminal.

On November 28, the Employer wrote the Regional Director, again requesting reconsideration of the decision. The Employer argued that it had never been informed as to whether or why its proposed voting site was inappropriate. The Employer asserted that even if the Regional Director found its suggested site unsatisfactory, he was authorized under the Stipulation to select another. Finally, the Employer argued that the terms of the Stipulation remained binding on all parties, including the Regional Director, and stressed that it would never have entered into the Stipulation if it allowed the possibility of a mail ballot election.

The Region conducted the mail ballot election from November 28 through December 9. Following the election, the Employer filed timely objections, claiming, among other things, that by conducting the mail ballot election, the Regional Director materially breached the terms of the Stipulated Election Agreement as to both the time and method of the election. For the following reasons, we agree.

The Board has long held that election agreements are ''contracts,'' binding on the parties that executed them.[6] *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968); *M.W. Breman Steel Co.*, 115 NLRB 247 (1956). Because they are considered contracts, election agreements may be set aside only in limited circumstances. Regional Directors may revoke their approval of stipulations for ''cause.'' *Super Valu Stores*, 179 NLRB 469 (1969). Additionally, parties may withdraw from approved agreements, but only on an affirmative showing of unusual circumstances, or on agreement of all parties. *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979).

In the absence of these special circumstances, the Board will enforce Stipulated Election Agreements, provided their terms are clear, unambiguous, and do not contravene express statutory exclusions or established Board policy. See, e.g., *Business Records Corp.*, 300 NLRB 708 (1990); *Granite & Marble World Trade*, 297 NLRB 1020 (1990).[7] Thus, the Board has enforced unambiguous agreement provisions on such subjects as the unit for voting,[8] minimum hours of work required for eligibility,[9] and the polling places for specific groups of employees. *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993).

Because election agreements are regarded as contracts, the Board will set aside the election where a ''material term'' of the agreement has been breached. *Barceloneta Shoe Corp.*, supra. For example, in *KCRA-TV*, 271 NLRB 1288 (1984), the Board ordered a new election where the Region sent mail ballots to two employees even though, under the agreement, both were to vote in the manual portion of the mixed-manual/mail ballot election. In directing a second election, the Board held:

> A party to an agreement authorizing a consent election ''is entitled to expect that other parties and agents of the Board will diligently uphold provisions of the agreement that are consistent with Board policy and are calculated to promote fairness in the election.''[10]

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[6] The dissent argues that this ''contract'' principle is inapplicable to the Regional Director because he is not a party to the Stipulation. Our colleague further maintains that because the Regional Director has substantial discretion when determining election mechanics, he was free to alter unilaterally the terms of the Stipulation. We disagree. Regardless of whether the Regional Director is formally termed a ''party'' to the Stipulation, once he approved it he was clearly bound by its terms. *Summa Corp. v. NLRB*, 625 F.2d 623 (9th Cir. 1980). See also *KCRA-TV*, 271 NLRB 1288, 1289 (1984). As stated by the First Circuit in *NLRB v. Granite State Minerals*, 674 F.2d 101, 102 (1982):

> While no one denies that, as a general matter, the Board has broad discretion to determine the conditions for conducting representation elections, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed 332 (1946); *NLRB v. Morgan Health Care Center, Inc.*, 618 F.2d 127, 128 (1st. Cir. 1980), we here deal with an election held under a consented-to stipulation. This fact narrows the Board's discretion significantly for it would be manifestly unfair to allow the Board to obtain all the procedural advantages that flow from gaining the other parties' consent yet to excuse it from living up to its part of the bargain. Thus, a party ''is entitled to insist that the Board and all parties adhere to provisions of the election stipulation that are designed to ensure a fair election.'' *Summa Corp. v. NLRB*, 625 F.2d 293, 296 (9th Cir. 1980).

See also *Windham Community Memorial Hospital*, 312 NLRB 54 (1993).

Applying this rationale, the Board has set aside elections where the Board or its agents materially breach an election agreement. *KCRA-TV*, supra.

The dissent's attempt to distinguish the above cases—arguing that most involved Stipulated Election Agreements breached by ''parties'' rather than regional directors or their agents —is both inaccurate and unpersuasive. In *KCRA-TV*, it was the *Board agent's* mailing of ballots to two employees ineligible to receive them that materially breached the stipulation. Similarly, in *Summa Corp. v. NLRB*, supra, the court found that the stipulation was materially breached when the *Board agent* permitted the union to use more election observers that the employer. Finally, in *NLRB v. Granite State Minerals*, the stipulation was breached not because the union sought early voting for an employee, but because the *Regional Director*, contrary to the terms of the stipulation, and without the parties' consent, permitted the breach. See also *Sugar Food, Inc.*, 293 NLRB 1008 (1989). In any event, we do not agree with our colleague that the Regional Director, who is bound to the Stipulation, can breach it but that a private person who is party to the Stipulation may not do so.

[7] Conversely, where election agreements are ambiguous, the Board is authorized to interpret them to determine the parties' intent. *NLRB v. Barker Steel*, 800 F.2d 384 (1st Cir. 1986).

[8] Id.; *Wells Fargo Alarm Services*, 289 NLRB 562 (1988).

[9] *Windham Community Memorial Hospital*, 312 NLRB 54 (1993).

[10] Id., quoting *Summa Corp. v. NLRB*, 625 F.2d at 295. Accord: *NLRB v. Granite State Minerals*, 674 F.2d at 102.

Not every breach of an election agreement is a basis for a new election. Where, however, the breach is ''material or prejudicial'' the Board will set aside the election. Id.

Finally, apart from ''contract'' concerns, the Board's rationale for holding parties to the material terms of their election agreements is attributable, at least in part, to a recognition that the vast majority of election petitions result in Stipulated Election Agreements. As stated by former Board Chairman Edward Miller, ''chaos and delay would be created if parties lost the incentive to resolve by agreement the myriad of details attending an election.'' Quoted with approval, *Community Care Systems*, 284 NLRB 1147 (1987).

Applying the foregoing principles to this case, we find that the election must be set aside. First, there is no evidence or claim that the Regional Director revoked his approval of the Stipulated Election Agreement, or that any party received approval to withdraw. Similarly, there is no claim that the Stipulation was unclear, ambiguous, or contrary to settled law or Board policy. Further, the provisions of the Stipulation relating to the election time and place were at all times capable of performance. Thus, even when the original polling place proved unavailable, the Regional Director was authorized under the plain language of the Stipulation to designate another location for balloting. Indeed, the Employer attempted to assist the Regional Director in this designation by proposing polling places near where employees reported for work. The Regional Director does not contend that these sites were unsuitable or that other appropriate sites were unavailable. Instead of choosing a site suggested by the Employer or designating an alternative site however, the Regional Director ordered a mail ballot election, over the Employer's objection. In addition, the Regional Director changed the date of the election from December 2 to November 28–December 9.[11]

We believe that the date of an election and the type of election (manual or mail) are both very important elements of the election process. It is not unusual for parties to negotiate long and hard for their respective positions on these issues. Where, as here, they have reached agreement on these issues, that agreement cannot be cast aside, absent unusual circumstances which make the agreement impossible to perform.[12] In the instant case, there is no showing of such impossibility. That is, there is no showing that the location possibilities for a manual election had been exhausted. Further, even if there were a showing of impossibility, the appropriate procedure would be for the Regional Director to notify the parties of his intention to revoke the Stipulation because of that impossibility. At that point, the Regional Director could seek a new stipulation or, after hearing, issue a Decision and Direction of Election.

Our dissenting colleague seeks to focus on whether the mail ballot election was fairly conducted in a manner designed to reflect employee choice. The real issue however is the fundamental one of whether the election was conducted in conformity with the Act. Section 9(c) of the Act provides that an election can be conducted only after a hearing, or pursuant to a stipulation of the parties.[13] In the instant case, there was no hearing. Although there was a stipulation, the election was conducted contrary to its terms. As noted above, the Stipulation provided for a manual election, and the Regional Director materially breached the Stipulation by ordering a mail ballot election. Thus, assuming arguendo that the mail ballot election was fair, the fundamental point is that it was directed without statutory authority. Accordingly, we have no choice but to regard it as a nullity and to set it aside.

In sum, the Regional Director should have (1) honored the terms of the Stipulation or (2) if the Stipulation could not be performed, set the Stipulation aside and proceeded anew. What the Regional Director could *not* do was to hold a *mail-ballot* election under the

[11] In directing the mail ballot election, the Regional Director shortened the campaign period by 5 days. The dissent argues that this reduction in the agreed-upon campaign period was not a material breach of the Stipulation since it applied equally to the Union and the Employer. We disagree. First, because unions necessarily commence their organizing drives prior to filing election petitions, while employers may not learn of the organizing efforts until served with the petition, we cannot agree that a reduction in the campaign period equally affects the parties. Further, when parties agree to an election date in a Stipulated Election Agreement, they thereby establish the period for election campaigning. A party should be able to rely on this date when planning campaign strategy and a Regional Director should not change this date unilaterally. This is particularly true where, as here, no reason was given for accelerating the election.

[12] Contrary to the dissent, we find that this ''impossibility of performance'' standard is implicit from Board and court cases holding that where there is an approved stipulation, neither the parties nor the Board may breach its material terms. See, e.g., *KCRA-TV*, supra; *NLRB v. Granite State Minerals*, supra. Obviously, however, where material agreed-upon terms are impossible to perform, regional directors may set aside the stipulation. Absent a new stipulation, they must proceed to a hearing.

[13] Because this election was to be conducted pursuant to a Stipulated Election Agreement, and not pursuant to a Regional Director's Decision and Direction of Election (D&DE), the following cases relied on by the dissent are inapposite: *Daylight Grocery Co. v. NLRB*, 678 F.2d 905 (11th Cir. 1982); *Beck's Riverside Hotel v. NLRB*, 590 F.2d 290 (9th Cir. 1978); *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127 (9th Cir. 1973). Those cases involved elections scheduled by Regional Directors in D&DEs. Admittedly, Regional Directors have broad discretion in setting election terms, such as election dates, in D&DEs. It is equally well settled, however, that their discretion is significantly circumscribed where elections have been negotiated by the parties and approved by Regional Directors in Stipulated Election Agreements. *NLRB v. Granite State Minerals*, supra. In the latter case, the ''stipulation is binding on the Board and the parties.'' See generally *NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144, 1148–1149 (7th Cir. 1994).

aegis of the Stipulation, for the Stipulation contemplated a *manual election*.[14]

Accordingly, we find that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

MEMBER BROWNING, dissenting.

Contrary to my colleagues, I would affirm the Regional Director's recommendations to overrule the Employer's objections in their entirety and to issue a Certification of Representative.[1]

More specifically, in regard to the particular issue over which my colleagues and I disagree, I would affirm the Regional Director's recommendation to overrule the Employer's objection to the Regional Director's direction of a mail ballot election during the period November 28 through December 9, 1994,[2] rather than continuing to attempt to go through with the originally stipulated manual ballot election scheduled for December 2.

The essential facts are relatively straightforward. The Employer and the Union entered into a Stipulated Election Agreement (Stipulation), approved by the Regional Director, calling for an election to be conducted in two sessions (8–9:30 a.m., and 7–8 p.m.) on December 2, in a unit of all employees (excluding certain specified classifications) employed at the Employer's facility located at 7650 S. 228th,[3] Kent, Washington. The place of the election, however, was left ''to be determined by the Regional Director.''

The Employer did not own any premises at 7650 S. 228th. Rather, the 18 unit employees reported for work at the Employer's designated *facility*, a trailer located on the premises. The premises at that address were owned by another company, Sears, Roebuck & Co., that is not a party to this proceeding.

After approving the Stipulation, the Regional Director issued Notices of Election, designating the place of the election as the Employer's facility located at 7650 S. 228th. Thereafter, however, the Employer informed the Regional Director that Sears, Roebuck & Co. would not permit the election to be conducted on its property. The Employer proposed certain alternative sites for the election. The Union, however, would not agree to have the election conducted at any location other than the Employer's facility.

With the Regional Director's initially determined and announced location for the election now unavailable, and with the parties unable to agree on another location for the election, the Regional Director directed that the election be conducted by mail ballot, which was, in his judgment, ''the only reasonable alternative in these unusual circumstances.''

On November 18 and again on November 28, the Employer objected in writing to the Regional Director's direction of a mail ballot election. The Employer asserted to the Regional Director that the parties had stipulated to a manual ballot election, that they had not agreed to a mail ballot election, that the Employer had located a convenient, suitable alternative site for a manual election, in a private conference room in a motel within walking distance from the Employer's facility, and that it was therefore inappropriate for the Regional Director to ''force'' a mail ballot election. The Regional Director denied the Employer's requests that he rescind his direction of a mail ballot election.

The mail ballot election was conducted during the period November 28 through December 9. Of the approximately 16 eligible voters, 15 (or 94 percent) cast ballots, with 11 voting for the Union and 2 against it, and with 2 other voters casting ultimately nondeterminative challenged ballots.

My colleagues would set this election aside. They assert that the Regional Director was required to conduct a manual ballot election at *some* alternative location on December 2—either a location proposed by the Employer, or a different one selected by the Regional Director himself—unless, under the circumstances, it was impossible for the Regional Director to do so. And my colleagues assert that there is no showing of such impossibility in this case.

My colleagues do not cite any authority for their proposed ''impossibility of performance'' standard for determining when a Regional Director may direct and conduct an election that is different from the election to which the parties originally stipulated; rather, they find such a standard to be implied from cases (discussed below) finding that stipulations were improperly breached. Nor do they assert that the Regional Director acted arbitrarily under the circumstances described above in directing a mail ballot election instead of the manual ballot election that was originally contemplated. Finally, my colleagues do not assert that the mail ballot election was procedurally deficient in itself.

Setting aside the mail ballot election because it would have been possible to conduct a manual ballot election would, in my view, fail to focus on the more important underlying question of whether the mail ballot election, which *was* conducted reliably, reflects the unfettered will of the unit employees on the fundamental question in this case—whether a majority of the employees want to be represented by the Union.

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[14] We do not pass on whether the Regional Director could have *directed* a mail ballot election. We hold only that he could not hold a mail ballot election under the aegis of the Stipulation.

[1] My colleagues in the majority have found it unnecessary under the circumstances to pass on the issues encompassed in the Employer's Objections 9 through 11. I would affirm the Regional Director's recommendation to overrule those objections.

[2] All dates are 1994, unless otherwise stated.

[3] The Stipulation does not state whether S. 228th is a street, road, etc.

In considering the events in this case, I note at the outset that while the Regional Director *approved* the Stipulated Election Agreement, he was *not a party* to it.[4] Accordingly, the contract principles set forth by the majority do not bind the Agency and its Regional Directors, who have an independent public obligation to ensure the fair and expeditious conduct of elections. Thus, the Regional Director, unlike the Employer or the Union, could have unilaterally nullified the Stipulation simply by withdrawing his approval of it.[5] This alternative, however, would undoubtedly have added delay and confusion to the election arrangements. While such a course may be appropriate in some situations, in my view, the Regional Director is entitled to exercise substantial discretion in determining the mechanics of an election, because the Regional Director is responsible not only for balancing the parties' interests and desires, but also (and uniquely) for protecting the interests of the voters and the public. Accordingly, the regional director can and should consider such matters as employee expectations, convenience for the voters, cost and convenience for the Agency, and so forth. These discretionary decisions, of course, must be made in a manner consistent with the Board's established standard for evaluating changes in election arrangements when those changes are inconsistent with an election agreement.

It is well settled, as my colleagues concede, that an election will not be set aside for every breach of an election agreement. Rather, ''election results should be overturned only if the breach is material or prejudicial, *in the sense that the conduct causing the breach significantly impairs the fairness of the election process*.''[6] Thus, noncompliance with the provisions of a stipulation, like other alleged objectionable conduct, is to be judged on the basis of whether the breach was prejudicial or in the circumstances was sufficiently material to warrant setting aside the election.[7]

It is equally well settled that the Board has broad discretion to determine whether the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union.[8] Within this context, the Board has wide discretion in scheduling elections,[9] and this discretion has been delegated to the Regional Directors. The Board or its delegate may be reversed in the exercise of this discretion only on a showing of abuse of discretion *which denies an employee the opportunity to vote*.[10] Thus, a party challenging a Board-conducted election has the

[4] My colleagues claim, however, that even if the Regional Director is *not* a party to the Stipulation, he was nevertheless bound by its terms once he *approved* it. But the cases principally relied on by my colleagues in support of their claim involve a fundamental predicate—*party* responsibility for breaching of stipulations—that is not at issue in this case. Thus, those cases ultimately fail to support a claim that the Regional Director himself was bound to the terms of the Stipulation in this case simply because he approved it.

In *Summa Corp. v. NLRB*, 625 F.2d 623 (9th Cir. 1980), the union—not the Board agent involved—caused the stipulation to be breached by using more election observers than the employer. Likewise, in *KCRA-TV*, 271 NLRB 1288 (1984), the employer—not the Regional Director—caused the stipulation to be breached by intentionally having the Regional office staff send mail ballots to two employees whom the employer knew full well were expressly ineligible under the stipulation to vote by mail in the combined manual and mail ballot election. Indeed, it was the Regional Director himself who ultimately refused to count the two mail ballots that his staff had been improperly induced to send out by the employer. Finally (albeit less obviously), in *NLRB v. Granite State Minerals*, 674 F.2d 101 (1st Cir. 1982), the union basically caused the stipulation to be breached by (1) prevailing on the Regional Director to give permission for an employee to cast what was in effect an escrowed ballot a week before the date of the election, and then (2) transporting the employee from Portsmouth, New Hampshire, to the Board's office in Boston to actually cast the early ballot.

Thus, unlike the case at hand, none of the above cases involved the regional director's independent exercise of his or her broad discretion to determine the conditions for conducting representation elections. In each case, the action of the Regional Director or the regional office staff was predicated on an improper act or request by a party, and was thus subject to reversal on those grounds.

In the other case relied on by my colleagues in this context, *Windham Community Memorial Hospital*, 312 NLRB 54 (1993), the Regional Director was found simply to have misinterpreted the term ''scheduled to work'' in the stipulation as meaning ''actually worked''—a circumstance fundamentally different in kind from that presented in the case at hand.

[5] *Grant's Home Furnishings*, 229 NLRB 1305 fn. 3 (1977). Indeed, that—i.e., revocation of the stipulation—is precisely what my colleagues say that the Regional Director should have done under these circumstances.

[6] *Summa Corp. v. NLRB*, supra, 625 F.2d at 625 (emphasis added).

[7] *Grant's Home Furnishings*, supra, 229 NLRB at 1306. My colleagues have cited no authority for their contention that this election was a ''nullity'' under Sec. 9(c) because it was not directed by the Regional Director or conducted pursuant to the precise terms of the parties' Stipulation. In any event, this contention begs the ultimate question in this case. In my view, the election was conducted pursuant to a valid stipulation, because the Regional Director's action here was within his discretion and did not constitute a material breach of the Stipulation's terms. Accordingly, contrary to my colleagues' assertion, I do not suggest that the Regional Director is free to breach a stipulation while the parties are not; I would simply conclude, in disagreement with my colleagues, that the Regional Director's action in this case did not result in a material breach.

[8] *NLRB v. Duriron Co.*, 978 F.2d 254, 257 (6th Cir. 1992); accord *NLRB v. Best Products Co.*, 765 F.2d 903, 908 (9th Cir. 1985).

[9] *Beck Corp. v. NLRB*, 590 F.2d 290, 293 (9th Cir. 1978).

[10] *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 910 (11th Cir. 1982), citing *NLRB v. Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1132 (9th Cir. 1973). My colleagues seek to deflect the precedential effect of the general principles contained in these cases and in *Beck Corp. v. NLRB*, supra, on the procedural grounds that the elections in those cases were scheduled pursuant to Decisions and Directions of Election issued by Regional Directors, rather than stipulations entered into by the parties themselves. But the fact that the dates of the elections at issue in those cases were determined by Regional Directors in the exercise of their discretion is why the principles espoused in those cases are also applicable here. In this case, as in those, the propriety of the Regional Director's selection of the date and method of the election has been challenged as an abuse of his discretion. Thus, to the extent that the cited cases provide guidance on that issue—and they undeniably do—they are indeed apposite to the case at hand.

burden of showing not only that alleged improper acts occurred—here, for example, the Regional Director's allegedly improper direction of a mail ballot election—but also that those allegedly improper acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.[11]

Applying these principles, I find that the Employer has not made a showing that the Regional Director's direction of a mail ballot election, under these circumstances, constituted a deviation from, or breach of, the Stipulation, which deprived the employees of an opportunity to exercise free choice in voting whether to be represented by the Union, or which in any other way significantly impaired the fairness of the election itself, or affected its outcome. Fifteen out of the sixteen eligible voters in the unit voted, so the fact that the election was conducted by mail ballot obviously had little or no effect on voter participation. The Employer asserts that conducting the election by mail shortened the time it had to campaign. I would not find that shortening the campaign period by 5 days (i.e., ending on November 28 rather than on December 2) significantly impaired the fairness of the election. And in any event, the campaign period was shortened for the Union as well, so the Employer can hardly argue that it was uniquely prejudiced by the change.[12] Finally, the emphasis of the Employer and my colleagues on the time needed for campaigning ignores the primary purpose of an election, whether it be conducted by stipulation or by direction of the Regional Director, which is to provide a forum for the employees to express their choice for or against union representation, not a forum for parties to campaign. As long as the Regional Director's actions do not alter the stipulated election arrangements in such a way that the employees are no longer provided with a free and fair opportunity to express this choice, the Stipulation has not been materially breached. Accordingly, I would conclude that the Employer has failed to meet its burden of showing that the Regional Director's actions constituted a material and substantial breach of the parties' Stipulation that caused any prejudice either to the Employer or to the employees' free choice in the election.

In the final analysis, the disagreement between me and my colleagues comes down to what we respectively perceive to be the ''real issue'' in this case. My colleagues see it as whether the Regional Director abused his discretion by imposing election mechanics not contemplated by the parties when they entered their election stipulation. I, on the other hand, view the crucial issue here as whether the election that was held was fairly conducted and reliably reflects the unfettered will of the unit employees on the underlying central question in this case—as in all representation election cases—of whether a majority of the unit employees want to be represented by the Union. Here, the election was conducted fairly to the most important people in this case, the unit employees themselves. Thus, notwithstanding the expectations of the Employer and Union that there would be a manual election, there is no substantive reason here, in terms of the fairness of the mail ballot election that was ultimately conducted, for setting that election aside.

For the foregoing reasons, I would affirm the Regional Director's recommendation to overrule the Employer's objections on this issue, and to issue a Certification of Representative.

[11] See *NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144 (7th Cir. 1994).

[12] My colleagues assert that unions normally campaign for longer periods of time prior to elections than employers do. Assuming for the moment the accuracy of that assertion, at least as applied to this case, the fact nevertheless remains that the amount of time that the Union and the Employer would both normally have spent campaigning prior to the initially scheduled election was equally reduced for both of them because of the rescheduling. Even if, as my colleagues seem to imply, the Employer was, in the normal course of events, behind the Union in terms of time spent campaigning, the Regional Director's rescheduling of the election certainly did not put the Employer any further behind.